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IN THE

Supreme Court of the United States

JAMES J. BELHUMEUR, *et al.*,

Petitioners,

v.

MASSACHUSETTS LABOR RELATIONS COMMISSION;
SPRINGFIELD EDUCATION ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Whenever employees are compelled to pay union fees, this Court requires procedures by which they can challenge the fee amount. When this "challenge" remedy was first devised as a method to protect employees from coerced political speech, Justice Black dissented, predicting that such challenge procedures would place an undue burden on employee Free Speech rights.

1. Does a challenge procedure, which takes eight (8) years to provide the "reasonably prompt" determination required by *Chicago Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), place an undue burden on employee Free Speech rights?

2. Does a challenge procedure unduly burden employee Free Speech rights when it: a) charges them for 100% of certain union overhead expenses even though only 50% of the underlying activities are chargeable; b) charges them for 100% of union meetings where nonchargeable political and chargeable collective bargaining activities are commingled, and the union is unable to establish the proper proportion of each; c) shifts the burden of proof to the challengers; and, d) requires challengers to pay over $25,000 to obtain a transcript without which these issues could not be properly argued or preserved for judicial review?

3. Do all challenge procedures, as Justice Black predicted in *IAM v. Street*, 367 U.S. 740 (1961), contain such high transaction costs that they of necessity unduly burden Free Speech rights?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners not listed on the cover are: Helene Adams, Jean Pierre Anselme, Peter Anthony, Clyde Armstrong, Sharon Barnett, Elizabeth J. Beauregard, Raymond J. Beauregard, Anne J. Bovat, Ben Branch, Marguerite Burchell, Mary Burger, Michael Burns, Patricia Burns, Carolyn T. Canavosio, Albert J. Carlin, Nancy Carlson, Richard Carrerio, Vere Chappell, Charles Cipollini, Paul T. Coffill, Joseph H. Connolly, Kenneth E. Cook, Jr., Susan J. Danton, Elvira Darmiento, Robert Davis, John F. Dowd, Brian J. Downey, David Dupuis, Eleanor Dupuis, John P. Ebersole, David E. Elworthy, Reza Fazel, Dennis A. Fenton, Barbara W. Finkel, Lawrence Finnerty, Jean Flint, Deborah Flynn, Clive Foss, Barbara A. Freeman, Hugo Galli, Diane T. Galluccio, Ronald Galluccio, Gerald R. Garrett, Anne Garvey, Deborah K.T. Gendreau, Francis Guiliano, Waldo Goodermote, Estelle A. Gross, Joseph Gustafson, Joseph E. Hagan, Leslie A. Hansen, Marial Harper, Sylvia Hebert, Richard Herbst, Jean Jonker, Elizabeth H. Karr, Frank Katch, Paul F. Kelley, Angela Kennedy, Barbara Kirby, Richard Kofler, Michael Kreisler, Nelson J. Lacey, Francis LaPorte, Stephen LeClair, Patricia LeMay, Cynthia Leal, Ann Luchini, Edward Lundrigan, Laura MacPhaul, Harold P. Mahon, John W. Mandell, Ellen Manolakis, Martin Manoogian, Norma L. Markey, John F. Marzilli, Maria Mazzaferro, Jose Mestre, Sheila Miano, Benjamin Mollow, Loretta Morelle, Siamak Movahedi, Richard J. Mulhern, William A. Nash, Patrick Nerbonne, Gerard O'Brien, Ellen R. O'Neil, Jeanne Pallatroni, John D. Palmer, Arthur J. Papandrea, Abel Pimental, Francis Porcaro, David Pozar, Richard Ricciardi, Edwina Rissland, Nancy Roberts, George Russell, James Ryan, Kathryn Sanders, William E.

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The respondents not listed on the cover are: National Education Association, Massachusetts Teachers Association, Andover Education Association, Arlington Education Association, Bridgewater Education Association, Chicopee Education Association, Fairhaven Education Association, Faculty–Staff Union, Holyoke Education Association, Massachusetts Society of Professors, New Bedford Education Association, Quabbin Education Association, Tantasqua Education Association, Wareham Education Association, Woburn Education Association, and Education Association of Worcester.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners James J. Belhumeur, *et al.*, respectfully request that a writ of *certiorari* issue to review the judgment of the Supreme Judicial Court of Massachusetts, in *Belhumeur v. Labor Relations Commission,* 432 Mass. 458, 735 N.E.2d 860 (2000).

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 432 Mass. 458 and 735 N.E.2d 860 (2000). The opinion is reproduced in Appendix ("App.") A to this Petition at 1a. The opinion and order of the Massachusetts Labor Relations Commission is reported at 23 MLC 233 (1996) and is reproduced in Appendix B at 25a. The Recommended Findings of Fact and Recommended Conclusions of Law of the Hearing Officer are unreported and are reproduced in Appendix C at 100a.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment and order on September 21, 2000. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution. This case also involves Massachusetts General Laws chapter 150E, § 12. Their pertinent text is set out in Appendices D and E at pages 306a and 307a.

STATEMENT OF THE CASE

I. Factual Background.

James Belhumeur and his fellow teachers ("teachers") are required to join the Massachusetts Teachers Association ("MTA" or "union") and its affiliates or pay to them a nonmember agency fee as a condition of employment. This is the result of a contract between their employer and the local union affiliated with the MTA.

Over the five-year period at issue here, the MTA's agency fee demand ranged from 97.9% to 74.5% of dues.

Year	MTA Dues	MTA Agency Fee	%
1987-88	$178.00	$157.57	88.5%
1988-89	$191.00	$186.95	97.9%
1989-90	$203.00	$196.36	96.7%
1990-91	$217.00	$207.10	95.4%
1991-92	$229.00	$170.70	74.5%

The teachers believed these fee demands were excessive, thereby violating their Free Speech rights. In Massachusetts, the Supreme Judicial Court directs agency fee objectors to initially file agency fee challenges with the Labor Relations Commission ("Commission"). *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70 (1982).

As a result, beginning on July 27, 1989, Mr. Belhumeur and 118 other teachers filed 429 challenges over a five-year period objecting to the amount of the agency fee. All of these challenges specifically contended the teachers' First Amendment rights were being violated by the union's excessive charges.

On July 11, 1990, approximately one year after the initial challenge was filed, the Commission issued its first complaint against the union, alleging that the agency fee demand was excessive. As more challenges piled up unresolved before the Commission, on July 15, 1992, the teachers sought to streamline the resolution of five years of agency fee challenges. They entered into a partial

settlement agreement designed to make the MTA's actual expenses for the 1990-91 year (which formed the basis for its 1991-92 demand) the focus of a trial to determine the agency fee percentage for all five years.

The hearing on the proper amount of the MTA fee began on February 8, 1993, before a Hearing Officer designated by the Commission. By the second day of trial, the evidence revealed the MTA was directing and financing its primary political campaign through its "collective bargaining" division (Affiliate Services), a division which the union previously claimed in its agency fee demand contained no political expenses whatsoever. This led the teachers to make a Motion for Judgment, which was denied. Thereafter, the trial ground on for 53 days spanning the next 23 months, and concluded on December 14, 1994. (App. 27a)

On March 21, 1996, the Hearing Officer issued a 240-page recommended finding that the MTA violated the law by demanding an excessive agency fee. (App. 100a)

A little more than a year later, on April 23, 1997, the Commission acted on the recommendations of the Hearing Officer. (App. 25a) With few exceptions, it accepted the recommendations and found that the agency fee demand was illegally excessive. The Commission found that an agency fee of 66.3% of dues was appropriate based on the evidence.

Both the teachers (who thought the agency fee was still excessive) and the union filed timely notices of appeal. More than two years later, on August 17, 1999, the Commission assembled the record and the case was

entered on the docket of the Appeals Court. The Massachusetts Supreme Judicial Court granted direct review, bypassing the Appeals Court, and handed down its decision on September 21, 2000. (App. 1a)

The teachers were before the Commission from July 27, 1989 until August 17, 1999, eight (8) years of which were devoted to reaching a Commission decision. All this time the teachers' money was (and still is) tied up in a Commission-mandated escrow account.

In its decision, the Commission opined that it was providing the prompt preliminary hearing required by *Chicago Teachers Local 1 v. Hudson,* 475 U.S. 292, 307 (1986). As a result, it determined that it need not "adhere to judicial rules of evidence and procedure" (App. 28a-29a) and should, instead, "harmonize" the usual requirement of "an adequate evidentiary basis" with the *Hudson* requirement of a "reasonably prompt decision" (App. 37a), with the result that "reasonable estimates" and "fair approximations" would be appropriate. (App. 53a, n.15)

This evidentiary approach resulted in the Commission accepting as adequate the union's proof of its *political* activities, *i.e.,* proving what the nonmembers did not owe the union. The Commission described its findings as follows:

> After the MTA met its *prima facie* burden, the [nonmembers] met their production burden by calling into question aspects of the Union's *prima facie* case. The [nonmembers] challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered

> chargeable to nonmembers that the [nonmembers] argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.[11] (App. 38a-39a)

In footnote 11 the Commission continued:

> For example, the MTA offered detailed charts accompanying Janet Strecker's affidavits correcting this allocation of nonchargeable activities within the Affiliate Service Division. (App. 39a)

The Commission later concluded:

> We find that, on this record, the MTA met its burden of persuasion that its *political time and activities can be isolated and segregated.* We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' *primary political activities.* (App. 46a-47a) (emphasis added)

The Commission thus allowed the union to satisfy its burden of proving the chargeable amount solely with negative evidence concerning the extent of its political activities.

The Commission also determined that if a union meeting involved a mixture of chargeable and political time, the *entire* meeting could be charged to the teachers. The Commission described its approach this way:

> We reject the notion, implicit in the listing of events in Appendix D, that any gathering at which a nonchargeable topic is referenced becomes a fully nonchargeable event. (App. 48a)

Instead, the Commission accepted the notion that, notwithstanding their clear political content, these union meetings were *fully* chargeable events.

An example of a fully chargeable meeting follows. The agenda of the Tuesday, November 13, 1990 "Management Meeting" reads:

1. Question Three [A statewide tax referendum.]
2. State budget
    a) Shortfall
    b) Tax cuts
    c) 2½ changes
3. Political organizing at local level
4. Membership
5. MATA agreement
6. Personnel updates
7. Financing political action
8. Brief updates on division activities
9. Other

Similar management meetings reflecting substantial political work were likewise treated as 100% chargeable.

Another example illustrates the inconsistent and arbitrary nature of the Commission's approach. The union held a meeting which was expensed under the category "Assist locals in extraordinary collective bargaining situations." Although the union claimed this was a chargeable collective bargaining expense, the teachers showed that this program contained expenses for flying representatives from other state teacher unions cross country to tell the union's paid employees about their personal experience in conducting statewide strikes in their home states.

While the Commission found the specific travel expenses of the speakers to be nonchargeable, it charged the teachers for the union staff time and expenses of those who listened to the political presentation. Why? Because other, non-political matters were discussed and "there was no indication" the political matters caused additional expenses. (App. 52a)

Yet another example involved the "overhead" divisions of the MTA. The Commission treated certain overhead divisions, such as accounting, as 100% chargeable to the teachers, notwithstanding the Commission's findings that only half (52.4%) of the MTA's non-overhead expenses were chargeable. (Compare App. 81a with App. 84a-85a)

Indeed, the Commission treated MTA's accounting division as 100% chargeable, even while finding that it spent time working on political campaign reporting and recordkeeping for the MTA's political action committee. (App. 81a) Although the Supreme Judicial Court modified the Commission's decision by ordering it to subtract from chargeable expenses the specific political hours proven by the teachers to have been expended in the accounting

division, it allowed everything else to be charged to them. (App. 15a-16a)

Finally, a hearing of this magnitude (53 days) necessarily called for a written transcript to allow proper argument and judicial review. The Commission not only rebuffed the teachers' request to use the least expensive, competent court reporter (Commission Docket number ("Docket") 81a), but left the teachers with a $25,000 court reporting bill. (Docket 110)

II. The Federal Question.

In *Abood v. Detroit Board of Education,* 431 U.S. 209, 234 (1977), this Court ruled that public employees compelled to pay union fees have a Free Speech right to refuse to support the political and ideological positions of unions. At the same time, this Court acknowledged the difficulty in drawing the line between chargeable and nonchargeable union expenditures. *Id.* at 236.

Last term this Court again admitted the difficulty in "defin[ing] germane speech [expenses chargeable to objectors] with ease or precision" in this type of case. *Board of Regents v. Southworth*, 529 U.S. 217, __, 120 S. Ct. 1346, 1355 (2000).

It is critical that this difficult task be properly and carefully performed, for it draws the contours of the teachers' First Amendment rights of free speech and association. *See, generally, Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991); *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the

content of the speech. We therefore consider the Act as a content-based regulation of speech.").

As a result of the fundamental rights at stake, this Court determined that "carefully tailored" procedural safeguards must be followed to "minimize the infringement" on First Amendment rights. *Hudson,* 475 U.S. at 303, 307.

One of these procedural safeguards is a "reasonably prompt decision" on the amount of the agency fee by an impartial decision-maker. *Id.* at 307. *See, Air Line Pilots Ass'n v. Miller,* 523 U.S. 866, 876 n.4 (1998).

In Massachusetts, this initial decision-maker is the Labor Relations Commission. *School Comm. of Greenfield,* 385 Mass. at 76, 85. Not only did the Supreme Judicial Court assign this obligation years ago, the Labor Commission confirmed in this specific case that it was providing the teachers with their *Hudson* hearing (App. 29a) and the Supreme Judicial Court agreed the hearing at issue was the *Hudson* hearing. (App. 6a, 8a-9a)

The Hearing Officer, the Labor Relations Commission and the Supreme Judicial Court analyzed this case in light of the foregoing First Amendment principles because the objecting teachers raised their federal constitutional rights from the onset of this litigation. The first document filed with the Labor Commission, the Prohibited Practice charge, stated in part: "These [agency fee] demands violate ... [the] federal constitutional rights of the charging party." (Docket 39)

The teachers' brief to the Hearing Officer (Docket 93, Charging Parties Brief on the Merits), on pages 38-52

(Vol.1) and pages 192-96 (Vol.3), specifically argued the agency fee procedures were unconstitutional as applied. This argument also was made to the Commission, in the teachers' challenges to the proposed findings of fact and conclusions of law of the Hearing Officer. (Docket 102, Charging Parties' Challenges, pp. 13, 31-39, 345-49)[1]

The teachers devoted their entire brief to the Supreme Judicial Court to their claims that the decision and the procedures used by the Labor Relations Commission to arrive at the chargeable versus nonchargeable calculation violated their First Amendment rights. (Charging Parties-Appellants' Brief, pp. 18-59.) Their conclusion (p. 58) stated, "For these reasons, this Court should declare the current agency fee procedure an unconstitutional burden ...."

The Supreme Judicial Court, based on the First Amendment, ruled on the teachers' objection to the delay in the *Hudson* hearing. It concluded that, despite the eight (8)-year adjudication, the Commission provided "a reasonably prompt decision." (App. 8a) It held that charging the teachers for 100% of mixed (political and nonpolitical) meetings and a "presumption" of

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[1] The teachers raised the issue of the burdensome nature of the transcript costs informally at the prehearing conference, and they filed a formal motion (Docket 81a, Motion To Limit The Undue Financial Burden Placed On Charging Parties In Challenging The Agency Fee Amount) on April 7, 1993, just after the trial started. On May 2, 1997, the teachers also filed a post-hearing motion for an award of $26,866.71 in transcription costs. (Docket 110)

chargeability for certain mixed meetings was consistent with the First Amendment. (App. 10a-16a & 13a n.12)

REASONS FOR GRANTING THE WRIT

I. The Massachusetts Procedure Reveals the Time Has Come to Re-evaluate the Burden on Employee First Amendment Rights Created by the *Street* Experiment.

This Court recently recognized the constitutional right of individuals to be "left alone" and not be forced to support what someone else thinks is an excellent idea. *Hill v. Colorado,* 530 U.S. __, __, 120 S. Ct. 2480, 2489 (2000) ("right to be let alone ... characterized as the most comprehensive of rights and the right most valued by civilized men"); *Boy Scouts of America v. Dale,* 530 U.S. __, __, 120 S. Ct. 2446, 2451(2000) (right to express your own views "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); *California Democratic Party v. Jones,* 530 U.S. __, 120 S. Ct. 2402 (2000) (right of party to select own political candidate without outside interference).

The teachers here want to be able to teach their students without being forced into a decade long, expensive battle with the union. They wish to be left to their own political views, instead of being compelled to support the union's political preferences.

This Court's precedents leave no doubt that the Massachusetts compulsory union fee statute, G.L. c. 150E, § 12, compels the nonmember's speech. *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991); *Abood v. Detroit Bd.*

of Educ., 431 U.S. 209 (1977); *see, Riley v. National Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988).

Drawing the line between chargeable and non-chargeable union expenses therefore draws the line between what union speech nonmembers can be required to support and what speech they cannot be required to support. "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

> Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

United States v. Playboy, 529 U.S. 803, __, 120 S. Ct. 1878, 1888 (2000).

Massachusetts' scheme for drawing the line of compelled speech is inordinately burdensome. A vast gulf exists between the Court's pronouncements that the line must be carefully and finely drawn to limit the burden on nonmembers' free speech rights, versus the reality of what has occurred in this case.

This problem was accurately predicted by a member of this Court. When the Court, in *IAM v. Street*, 367 U.S. 740 (1961), first consigned individual political objectors

to protracted litigation involving accounting battles against organized labor to protect their Free Speech rights, the Court majority predicted these disputes could be resolved with "a minimum of administrative difficulty." *Id.* at 774 (footnote omitted).

While Justice Douglas had some reservations about that prediction, *id.* at 778, Justice Black believed the majority was patently wrong, and presciently predicted that the process would work a monumental infringement on the rights of objectors. Black wrote:

> It may be that courts and lawyers with sufficient skill in accounting, algebra, geometry, trigonometry and calculus will be able to extract the proper microscopic answer from the voluminous and complex accounting records of the local, national and international unions involved. It seems to me, however, that while the Court's remedy may prove very lucrative to special masters, accountants and lawyers, this formula, with its attendant trial burdens, promises little hope for financial recompense to the individual workers whose First Amendment freedoms have been flagrantly violated ....
>
> I cannot agree to treat so lightly the value of a man's constitutional right to be wholly free from any sort of governmental compulsion in the expression of opinions. It should not be forgotten that many men have left their native lands, languished in prison, and even lost their lives, rather

> than give support to ideas they were conscientiously against.

Id. at 795-96 (Black, dissenting)

Later, in 1977, when this Court added public servants to the growing list of employees whose Free Speech rights could be compromised by compelled union payments, it began to recognize, like Justice Black, that there existed "difficult problems in drawing lines between [chargeable and nonchargeable expenses]." *Abood*, 431 U.S. at 236.

When, thirty years after *Street*, and more than a decade after *Abood*, this Court actually heard a line-drawing case for teachers, the Court was hard-pressed to agree on how the First Amendment line on nonmembers' speech should be drawn. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

Most recently, this Court decided that the difficulties were so great in drawing the line on Free Speech rights that it would not impose the *Street* procedure on students and universities! *Board of Regents v. Southworth*, 529 U.S. 217, __ , 120 S. Ct. 1346, 1355 (2000) ("different members of the Court reached varying conclusions [in *Lehnert*] regarding what expressive activity was or was not germane to the mission of the association.... [I]t is difficult to define germane speech with ease or precision where a union or bar association is the party ....").

Experience now shows Justice Black was right! Forty years into the *Street* experiment and twenty years into the

Massachusetts agency fee procedure,[2] this Court should reconsider the transaction costs that Massachusetts in particular, and the *Street* approach to compulsory union fees in general, imposes on employees who object to being compelled to support organized labor's political point of view.

The Seventh Circuit in *Tavernor v. Illinois Federation of Teachers*, 226 F.3d 842, 850 (2000) recently focused on the "transaction costs" or "social costs" imposed on employees who, as here, are faced with burdensome agency fee challenge procedures. When *Tavernor* sounded the alarm about excessive transaction costs in agency fee challenges, it was simply reflecting this Court's long-standing position that imposing financial burdens on certain speech violates Free Speech rights because it tends to drive certain speakers from the marketplace of ideas. *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Here, the record reveals a burdensome, lengthy, repetitive annual objection procedure which discourages objections and encourages conformity among those teachers who oppose being forced to support the union's political and ideological messages. Justice Douglas, in *Railway Employes' Department v. Hanson*, 351 U.S. 225, 238 (1956), opined that this Court's theoretical approval of compulsory union fees would not prejudice possible future disapproval of compulsory fees if a record came before the Court showing the procedure "is used as a cover

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[2] *School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70 (1982).

for forcing ideological conformity or other action in contravention of the First Amendment."

This is exactly that case. This case not only has the record to show the excessive burdens of Massachusetts' agency fee procedure, it also shows unequivocally that the *Street* experiment cannot continue consistent with employee First Amendment rights. The specifics of these burdens, and how the Massachusetts' decision conflicts with federal decisions, is discussed next.

II. The Agency Fee Procedures Approved by the Massachusetts Supreme Judicial Court Impose Excessive Burdens upon the First Amendment Rights of Employees in Conflict with Decisions of This Court and Those of the First, Sixth, Seventh and Ninth Circuits.

A. The Conflict Concerning Undue Burden.

Tavernor, 226 F.3d at 850, said this about transaction costs in agency fee challenges:

> The Supreme Court has not asked for the impossible–it has not demanded that unions find a way to reduce transaction costs to zero–but it has sent the message that unions must use systems that will keep these costs to a manageable level.

Both the Ninth Circuit in *Grunwald v. San Bernardino City Unified School District*, 994 F.2d 1370, 1375, *cert. denied*, 510 U.S. 964 (1993) ("Requiring agency fee payers to go through the inconvenience, embarrassment and delay of recovering even a small sum ... is a burden they cannot be required to bear, unless ... the procedure itself is reasonable ....") and the Fifth Circuit in *Shea v.*

IAM, 154 F.3d 508, 515 (1998) (annual objection requirement for nonmembers found unduly cumbersome) recognize that the burdens placed on nonmembers in agency fee challenges must be kept to a minimum, or the agency fee collection system fails.

This is consistent with the Court's instruction in *Hudson* that agency fee procedures must minimize the burden on nonmembers. 475 U.S. at 309.

1. The Burden of a Lengthy Adjudication.

The *Hudson* hearing which the Supreme Judicial Court approved as being "reasonably prompt" took *eight (8) years* from start to finish (and an added two (2) years to assemble the record for court review). Viewing an eight (8)-year procedure as prompt conflicts sharply with decisions of several circuits. The Seventh Circuit held that a delay of over one (1) year is an unconstitutional burden. *Tavernor*, 226 F.3d at 849 ("[Teachers are] deprived of those funds for well over a year. This system places a significant burden on the objection process.").

Previously, the Seventh Circuit held that an adjudication of eighteen months was unconstitutionally long. *Perry v. Local 2569, IAM*, 708 F.2d 1258, 1262 (1983).

The Sixth Circuit described procedures taking less than two years as "cumbersome, excessively protracted, and calculated to discourage meaningful objections to union activity. As such, they certainly could not be characterized as expeditious within the teachings of *Hudson*." *Damiano v. Matish*, 830 F.2d 1363, 1372 (1987) (footnote & citations omitted).

The Ninth Circuit has described a period of less than one year to be acceptably prompt. *Grunwald,* 994 F.2d at 1372.

Lower federal courts have found that a delay of over one year in reaching a *Hudson* decision is unconstitutional. *Lehnert v. Ferris Faculty Ass'n,* 643 F. Supp. 1306, 1332-33 (W.D. Mich. 1986), *aff'd,* 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part,* 500 U.S. 507 (1991) (any decision that is not handed down before the end of the relevant fiscal year or soon thereafter is not "reasonably prompt"); *McGlumphy v. Fraternal Order of Police,* 633 F. Supp. 1074, 1083 (N.D. Ohio 1986) (Where "an objection could conceivably lay unresolved for 12 months," a union's fair share "procedure results in an unnecessary, and unconstitutional, delay in the resolution of objections."). One lower court called an eleven-month delay "maddening nonfeasance" on the part of the union. *Masiello v. U.S. Airways,* 113 F. Supp. 2d 870, 878 (W.D.N.C. 2000). On the other hand, another state supreme court determined that a delay of thirteen months is acceptable. *Kuehn v. AFSCME Council 65,* 435 N.W.2d 130, 131-32, 135 (Minn. Ct. App.), *cert. denied,* 493 U.S. 849 (1989).

When the Massachusetts Supreme Judicial Court addressed the conflicting decisions from the federal circuits, it simply said the fact that other courts had held "much shorter delays are unconstitutional [does not] mandate a conclusion that this proceeding was unconstitutional." (App. 9a, n.8)

Within the first two days of the agency fee hearing, it became clear that the union had not carefully calculated its agency fee demand. The undisputed evidence revealed

that the union had directed its employees to record all their political time and expenses to a program claimed in the agency fee demand to be 100% chargeable to agency fee payers. Although the objecting teachers asked, in light of this evidence, that their Motion for Judgment be granted and the fee declared illegal, the Commission allowed the hearing to continue for an additional 51 days spread over 2 years. (Docket 72, *see* App. 30a *ff.*)

If the Supreme Judicial Court is correct that an eight (8)-year adjudication is reasonable under Massachusetts' procedure, then that procedure is unconstitutionally burdensome to objecting teachers. *Tavernor*, 226 F.3d at 849.

An extraordinarily long adjudication is just one aspect of the burden imposed upon nonmember objectors by the Massachusetts system. The Supreme Judicial Court accepted several agency fee procedures, which are part of the state sanctioned system, which fairly can be said to maximize the burden on the teachers' First Amendment rights. A few examples from this litigation follow.

2. The Burden in Commingled Expenses.

The hearing revealed the union commingled nonchargeable political expenses with chargeable expenses and could not in many instances separate them. The teachers were nevertheless charged for 100% of the commingled expenses. Indeed, the Supreme Judicial Court approved the "presumption" that some commingled costs are chargeable. (App. 13a, n.12) Drawing the Free Speech line in such a way that it violates the teachers' speech rights, as opposed to the commingling union's

contractual rights, not only defies common sense, it conflicts with the First Circuit's position on this issue.

In *Schneider v. Colegio de Abogados*, 917 F.2d 620, 633-34 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992), the court determined that where the bar association was unable to adequately separate out intertwined (chargeable and nonchargeable) expenses, the entire category of expenses was automatically invalidated.

Here, the union spent 50% of its basic ("non-overhead") expenses on nonchargeable activities. Despite this, the Labor Commission and the Supreme Judicial Court determined it was appropriate to charge nonmembers 100% of the union's accounting ("overhead") expenses.[3] This is in conflict with the treatment of overhead expenses by other courts. *Fell v. Independent Ass'n of Continental Pilots*, 26 F. Supp. 2d 1272, 1280 (D. Colo. 1998) ("In general, overhead costs should be allocated in proportion to their relation to nongermane expenses ...."); *Lehnert*, 643 F. Supp. at 1312; *see Southworth v. Grebe*, 1996 U.S. Dist. Lexis 20980 at *34 (W.D. Wis. 1996) ("by subsidizing overhead expenses of a political or ideological organization the university subsidizes the entire effort of the particular student group"), *aff'd in part, rev'd in part, vacated in part*, 151 F.3d 717 (7th Cir. 1998), *rev'd on other grounds sub nom. Board of Regents v. Southworth*, 529 U.S. 217 (2000); *Beck v. Communications Workers,*

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[3] The Supreme Judicial Court modified the Commission's holding by determining where the teachers were able to prove specific accounting time spent on politics, only those hours should be deducted. (App. 16a)

776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (1986), *aff'd*, 487 U.S. 735 (1988).

The Supreme Judicial Court determined that because the accounting division was "necessary" for the existence of the union (App. 16a), the teachers could be charged for all of its expenses, despite the fact that 50% of the underlying union expenses overseen by the accounting division were not chargeable. This conflicts with *Ellis v. Railway Clerks*, 466 U.S. 435, 450-51 (1984), which ruled that although a union newspaper was necessary, it was not 100% chargeable.

3. The Burden in the Evidentiary Approach.

The Massachusetts Labor Commission further unduly burdened the teachers' First Amendment rights by shifting the burden of proof to the teachers. The Commission described its decision-making this way:

> After the MTA met its *prima facie* burden, the Charging Parties met their production burden by calling into question aspects of the Union's *prima facie* case. The Charging Parties challenged the reliability of the MTA's time keeping system and provided examples of activity the MTA considered chargeable to nonmembers that the Charging Parties argued the MTA spent on political events. In response, the MTA's witnesses acknowledged documentary evidence that it had misallocated some time to the incorrect account.

(App. 38a-39a)

Later, the Commission continued:

> The field staff's political activity was isolated and enumerated by Janet Strecker, whose affidavit forms a basis for the adjustments for misallocated nonchargeable time undertaken in the [Hearing Officer's] Recommended Decision. We find that, on this record, the MTA met its burden of persuasion that its political time and activities can be isolated and segregated. *We are persuaded that Strecker's testimony, including the charts contained in her affidavit, contained a reasonable, good faith ledger of the Affiliate Service staffs' primary political activities.*

(App. 46a-47a) (emphasis added)

In *dicta* in *Air Line Pilots Association v. Miller*, 523 U.S. 866, 877-78 (1998), this Court discussed the long-acknowledged constitutional obligation of the union to carry the burden of proof in this kind of litigation. The Court went on to say that the employees cannot simply "sit back," but must make their objections known. Here, as quoted above, the Labor Commission held that the objecting teachers carried their burden of production by showing numerous errors in the union's employee timekeeping records.

Thereafter, the Commission allowed the union to carry its ultimate burden of proof on chargeable employee

time by simply admitting the "primary political activities"[4] of the union's employees.

Allowing the union to prove its political activities (*i.e.*, prove a negative fact) instead of its legitimate, chargeable activities conflicts with this Court's specific *rejection* of the idea that subtracting political expenses from the total is the same as proving chargeable expenses. *Hudson*, 475 U.S. at 306-07. The Commission noted that it had before it approximately 15,000 MTA expenditures. The Commission shied away from requiring the MTA to prove chargeable costs because "the MTA would have been required to produce evidence about every one of its approximately 15,000 expenditures." (App. 34a) Obviously, a judgment, one way or the other, was going to be made on each of those 15,000 expenditures. As a result, the teachers were burdened with proving the 15,000 expenditures were political, and the union's burden was reduced to admitting whatever the teachers proved.

4. The Burden of Trial Costs.

The 53-day agency fee hearing is recorded on 8,000 pages of transcript. In a case as complex as this, a transcript is obviously necessary to secure appropriate

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[4] The Strecker affidavit (Docket 121, pp. 63–88), relied upon by the Commission, contained a list of union meetings. (Docket 1287, p. 4860) Strecker admitted that the meetings involved planning or reporting on activity outside the meetings. (Docket 1287, pp. 4865-69) She also admitted that her charts only accounted for time inside the meeting. (Docket 1287, pp. 4882-83) This accounts for the Commission's reference to only eliminating *part* of the MTA's political expenses.

judicial review. But the Commission saddled the teachers with $25,000 of the court reporting bill, and refused to even consider ordering the use of a less expensive court reporter. The listing of the MTA's agency fee claims for each of the five years (*supra*, p. 3) shows that even if a teacher filed a challenge for all five years, the amount of the MTA's claim against each was less than $1,000. This cannot be squared with limiting as much as possible the transaction costs of those teachers seeking to vindicate their Free Speech rights.

Thus, from beginning to end, the Massachusetts procedure improperly burdened the rights of nonmembers. This burden began with an eight (8)-year long "prompt procedure," included the $25,000 court reporter's fee, and ended with evidentiary rules which consistently and obviously compelled the teachers to support the union's political and ideological activities.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein on the most recent application of the *Street* experiment.

Respectfully submitted,

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